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ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF PENNSYLVANIA.¹

Estates upon Condition.—Where land is granted in fee simple to be occupied for railroad purposes only, and to revert to the grantor or his heirs if used for any other purposes or no longer needed for such use, the reversion does not take effect until actual abandonment; and hence until that time the railroad company, grantees, may remove the machinery in their shops erected on the land granted: *Pennsylvania Railroad Co. vs. Parke et al.*

Tenants in common—*Trespass quare clausum fregit.*—A tenant in common can sustain an action of trespass against his co-tenant, only in case of an unequivocal ouster from his rights of entry and possession: *Filbert vs. Hoff.*

Hence, where one owning three-fourths of a tract of land, brought an action of trespass *quare clausum fregit* against a co-tenant owning one-twelfth, both having been in possession and use of the land, and no ouster by the co-tenant being proved, but only his verbal denial of the plaintiff's title, it was *Held*,

That as the denial was not equivalent to ouster, the action brought by plaintiff against defendant for cutting and carrying away timber from the land could not be sustained: *Id.*

Affidavit of Defence—*What Instruments of Writing are within the Rule.*—A lease, reserving a pecuniary rent, is “an instrument of writing for the payment of money,” within the Act March 28th 1835, relating to judgments for want of an affidavit of defence: *Frank vs. Maguire.*

It is necessary only to file a copy of the lease, without statement or declaration, to entitle the plaintiff to judgment for want of an affidavit of defence: *Id.*

A tenant is bound by his express covenant to pay rent, though he has assigned the lease with his landlord's assent, and the assignee is accepted as tenant, and rent received from him, unless the landlord has accepted the surrender of the former and released him: *Id.*

An affidavit of defence in an action for rent, alleging the assignment of the lease by consent of the landlord, and the acceptance of the assignee by him as tenant, and the receipt of rent, held insufficient because it did not aver a surrender of the term: *Id.*

¹ From Robert E. Wright, Esq., State Reporter; to be reported in the 6th volume of his Reports.

Custom in Violation of good Morals not admissible in Evidence.—A custom is not legal if contrary to morality, religion, and the law of the land ; but is unreasonable and therefore not compulsory : *Holmes et al. vs. Johnson.*

In an ejectment growing out of a disputed title to land, the claimant being a negro born in another state, the defendant offered to prove that in the region whence the plaintiff came, it is not customary for colored people to form legal marriages, and that the majority of them cohabit promiscuously, as well among free colored persons as slaves, in order to rebut the presumption of marriage and legitimacy from cohabitation : but the offer was rejected :

Held, that as the testimony would have tended to establish a custom contrary to public morals and decency, the rejection of the offer was proper : *Id.*

Wharfinger, Power of to sell—Vendor of chattel, when an incompetent Witness—Forfeiture of Personal Property by Negligence.—A wharfinger has no power to sell coal deposited on his wharf, for unpaid wharfage : *Kusenburg vs. Browne.*

Coal belonging to one, was by mistake deposited on the wharf of another, who after some time sold the coal to a third person, against whom the owner brought trover, to recover its value : on the trial, the vendor was offered as a witness for the defendant, but was rejected. *Held*, on writ of error, that the witness, being the vendor in possession at the sale, and bound to the vendee upon the implied warranty of title, was incompetent unless released : *Id.*

The plaintiff, in leaving the coal on storage upon the wharf, was not guilty of such negligence as would justify the sale of the coal, or a verdict against him, in the action to recover its value : *Id.*

Mental Incapacity, Proof of required to rescind executed Contract.—Mere mental weakness will not authorize a court of equity to set aside an executed contract, if it does not amount to inability to comprehend the contract, and is unaccompanied by evidence of imposition or undue influence : *Aiman et al. vs. Stout.*

Right of Widow to control the Disposition of the Remains of her deceased Husband.—A wife has no right or control over the body of her deceased husband after burial : the disposition of the remains of the deceased belongs thereafter exclusively to his next of kin : *Wynkoop vs. Wynkoop.*

A widow filed a bill in equity against the brothers of her deceased husband, and his mother in whose cemetery lot he was buried, to obtain the removal of the body to another cemetery, claiming her right so to do as administratrix and as widow. *Held*,

(1.) That her duty to bury the body of the deceased terminated with the burial: and,

(2.) That as widow she had no right to it, after the interment: *Id*.

What Streams are navigable—Extent of grant to riparian Owner—Right of Navigation how affected by State Legislation.—In Pennsylvania, all rivers and streams of water, that are subject to tides, or capable of being navigated in the common sense of the term, are treated as navigable: and grants of the adjoining soil are not *usque ad filum medium aquæ* but only to low-water mark, the soil and water found between the lines that describe low water, being retained as *eminent domain* for the use of all citizens: *Flanagan vs. The City of Philadelphia et al.*

The right of navigation in all such navigable waters is the paramount public right of every citizen: *Id*.

But where a river is wholly within the limits of the state, it is within the power of the legislature to diminish the navigability by the erection of a bridge, at or below tide-water, the state law not conflicting with any constitutional enactment of the general government in respect to such tide-waters: *Id*.

Voluntary Conveyances, when fraudulent as against subsequent Creditors—Trust Estate, how affected by Will made under Power reserved in Deed of Trust to use of Grantor and his Heirs.—One *sui juris* cannot, as against creditors either prior or subsequent, settle his property in trust for his own use for life, and over to his appointees by will, and in default of such appointment to the use of his lawful heirs in fee: *Mackason's Appeal. Bartram's Estate.*

Property so settled is assets in the hands of the trustees for the payment of debts, whether contracted prior or subsequent to the execution of the deed of trust: and the devisees or appointees under the will of the settlor will be postponed to his creditors: *Id*.

Bond of Married Woman void even though the consideration for the Bond be one on which an Action may be maintained.—The judgment-bond of a married woman is absolutely void, though given for debts contracted before marriage, or for necessities for the support and maintenance of her

family : her separate estate, if liable for debts thus contracted, must be reached through the proper form of action, and not by means of instruments declared to be null and void by the law : *Samuel Keiper vs. Elizabeth Helfricker, impleaded with Samuel Helfricker*.

Where a married woman gave a judgment-bond to one who advanced her money to be applied at the time for the purchase of real estate by her for her sole and separate use, and which was in fact so applied, *held*, that the bond so given was void, and could not be enforced against her separate estate : *Id.*

Execution Clause in Policy of Insurance, construed—What constitutes a Levy within the meaning of such Clause.—A clause in a policy of insurance, that it should “cease at and from the time the property hereby insured shall be levied on or taken into possession or custody, under any proceeding at law or equity,” is to be construed as meaning an actual levy and change of possession under it; a mere notice of levy by the officer charged therewith to the defendants at their store, without his taking the goods insured into possession or custody, though good as a levy, will not defeat the policy : *Commonwealth Insurance Co. vs. Berger*.

Conversion of Real Estate into Personalty.—To establish a conversion of land into money under a will, the sale must be absolutely directed, irrespective of all contingencies : the direction to sell must be imperative, independent of all discretion : *Anewalt's Appeal*.

Contracts, what are void as against Public Policy—Compromise of Civil Process or Private Injury binding on Parties.—Contracts which offend against the common law and public policy are void, but a compromise of a civil process or of a private injury, is binding : *Weeks vs. Lippencott*.

Hence, a promise to pay money to one through whose land a road had been laid out, for withdrawing his opposition to opening it, is a valid consideration on which an action may be sustained : *Id.*

Congregations—Regulation of Church Matters.—A majority of a church congregation may direct and control in church matters consistently with the particular and general laws of the denomination to which it belongs, but not in violation of them : *Sutter et al. vs. Trustees*.

Where a congregation forms a union with another, of a different denomination, which had an established form of church government, the former is bound by the rules of the denomination which it has joined, and cannot afterwards secede therefrom by a vote of the majority of its members : *Id.*

SUPREME COURT OF NEW YORK.¹

Trespass upon Land—Ejectment against Municipal Corporations.—To constitute a cause of action for trespass upon land, it must appear that the plaintiff, at the time of the alleged trespass, had the actual possession of the land, or that, being then disseised, he has since regained the possession by entry, or has obtained a judgment awarding it to him: *Cowenhoven vs. City of Brooklyn*.

A plaintiff cannot recover damages for injuries to his possession when the allegations in his complaint negative the existence of such possession in him: *Id.*

Ejectment cannot be maintained against a municipal corporation by proof that at the commencement of the action the *locus in quo* was in use by the public as one of the public streets of a city: such use being inconsistent with actual occupancy by the corporation, and not affording evidence of any claim by it that it owns or has any interest in the premises: *Id.*

The grading, paving, and cleaning of the street are acts necessary for the fair enjoyment of the public right of way; and may be regarded as showing that the corporation claimed an easement for the public upon the land; but cannot be considered evidence that it claimed any title to, or interest in the land itself: *Id.*

Insurance—Premium Notes—Assessments—Surrender of Policy.—An assessment made upon a premium note should be made without reference to a former assessment still in force against the maker of the note, and as to which the assessing power of the insurance company is expended. If it includes such former assessment it will be irregular: *Campbell, Receiver, &c., v. Adams*.

The surrender of a policy by the insured, and its cancellation by the insurance company, dissolves the relation of the insured as a member of the company, and the company has no further claims upon him, except for the unpaid assessments previously made: *Id.*

Husband and Wife.—Where land was purchased for a married woman as a homestead with her separate means, and she went into possession and

¹ From the Hon. O. L. Barbour, Reporter; to appear in the 38th volume of his Reports.

made valuable improvements thereon with her separate funds : *Held*, that the arrangement between the wife and her husband in respect to such purchase, being without any fraudulent intent, was lawful and should be sustained : *Damon vs. Hall and Wife*.

And that notwithstanding the property so purchased was by mistake made to the husband instead of the wife, her equity was superior to that of a creditor of the husband whose debt matured and whose judgment was recovered long after the title to the property had passed from the husband and wife, by conveyances to *bonâ fide* purchasers : *Id.*

Contractors on Public Works—Liability for Damages.—A mere contractor, though upon a public work, who is not a public officer, is not liable to third persons for damages occasioned by the non-performance of the obligations of his contract : *Fish et al. vs. Dodge*.

Accordingly, *Held*, that one who had entered into a contract with the state to keep a section of the Erie Canal in repair, was not liable to an individual who had sustained damages in consequence of his neglecting to perform that duty : *Id.*

Neither the contracting board nor the Canal Commissioners can be held to incur any liability for accidents or injuries to third persons, by reason of the failure of the contractors to perform their contracts : *Id.*

Nor is the state liable in such a case, because negligence in the selection of an agent or servant cannot be imputed against the state : *Id.*

Chattel Mortgage—Execution.—In order to bring the interest of a mortgagor of chattels within the power of an execution, there must be an absolute right of possession, for a certain and definite period, at the time the levy is made : *Farrell vs. Hildreth*.

A provision in a mortgage, allowing the mortgagee, in case he shall at any time deem himself insecure, to take possession of the property and sell it, previous to the time fixed for the payment of the debt, destroys the mortgagor's implied right to remain in possession a moment, provided the mortgagee shall deem himself insecure, and leaves him a mere tenant at sufferance. The nature of his interest is thereby determined to be uncertain and contingent : *Id.*

And if a sheriff, in such a case, with notice of the mortgage, and after demand of the property by the mortgagee, proceeds to sell the same on execution against the mortgagor, he renders himself liable to the mortgagee : *Id.*

SUPREME COURT OF MASSACHUSETTS.¹

Administrator—Expenses before discovery of Will, &c.—One who has been appointed administrator of the estate of his deceased wife, prior to the discovery of her last will, and under the supposition that no will existed, is not entitled to charge in his account of administration, after her will has been established, the expenses of opposing the probate thereof. But he may be allowed for expenses incurred in good faith, during his administration, before the establishment of the will, in procuring ancillary administration to be taken out in another state, for the collection of debts due to the estate of the deceased therein, and in indemnifying the administrator so appointed for his expenses in collecting such debts; and also for services performed and expenses incurred in good faith, with the knowledge of and without objection from the heirs at law, in securing the growing fruits and crops, and taking care of the stock, upon her farm, for which he has duly charged himself in his account: *Edwards vs. Ela*.

Devise—Trust—Failure of Trustee to accomplish purpose of Trust.—A devise of land and money in trust for the purpose of maintaining a "school-house and school, to be taught by a female or females, wherein no book of instruction is to be used to teach except spelling books and the Bible," is valid: *Tainter et al. vs. Clark*.

A trust under a will does not become extinguished by the failure of the trustee to accomplish its purpose within a reasonable time; but the trustee may be required to execute it, on a proper process by a proper party: *Id.*

Agreement to indorse—Liability on—Reasonable Notice.—Under an agreement to indorse any paper which another person may give for purchases made, to a certain amount each month, no liability arises until the purchases have been made and the notes given or requested to be given, or unless notice of the purchases has been given to the contracting party within a reasonable time; and a delay of nearly four months is unreasonable: *Schlessinger et al. vs. Dickinson*.

Limited Partnership—Strict compliance with Statutes respecting—Proof of special loss not necessary.—One who has not strictly complied with the requisitions of the statutes respecting limited partnerships cannot claim

¹ From Charles Allen, Esq., Reporter; to appear in the 5th volume of his Reports.

exemption, as a special partner, for the debts of the firm of which he is a member : *Pierce vs. Bryant and Another*.

The provision of Gen. Sts. c. 55, § 22, requiring an actual cash payment, as capital, to be made by one who enters a firm as a special partner, in order to exonerate him from liability for the debts of the firm, is not complied with by the delivery to the firm of promissory notes, which are received and treated as cash : *Id.*

The actual cash payment, as capital, required by Gen. Sts. c. 55, § 22, of one who enters a firm as special partner must be made prior to the publication of the certificate of the formation of the firm : *Id.*

In order to charge as a general partner one who has entered a firm as a special partner, without complying with the requisitions of the statutes respecting limited partnerships, it is not necessary for the creditor to prove that he has sustained any special loss by reason of such want of compliance, or that the party sought to be charged has been guilty of bad faith : *Id.*

Injury to person on Sidewalk—Liability of Town therefor.—A town is liable, under Gen. Sts. c. 44, § 22, to pay damages to a person who receives an injury by the fall of an awning projected over the sidewalk of a street by the owner of a building, if the awning has been, for the space of twenty-four hours before the happening of the injury, so frail that in the winds, rains and snows ordinarily occurring in this climate it was likely to fall, and did fall, from such cause, although the direct cause was snow which fell thereon less than twenty-four hours before : *Day vs. Inhabitants of Milford*.

Equitable Jurisdiction—Fraudulent Deed—Reconveyance.—The equitable jurisdiction of this court does not extend to cases where the parties have a plain, adequate, and complete remedy, either at common law, or under the statutes of the Commonwealth : *Pratt vs. Pond et al.*

A bill in equity does not lie to compel a reconveyance of land by the grantee named in a deed, which has been fraudulently obtained of the grantor and put on record after the execution but before the delivery thereof : *Id.*

Equitable Jurisdiction—Refusal of Mortgagor to deliver up Mortgage.—This court has jurisdiction in equity to require the delivery and surrender of a deed of mortgage, which, after having been executed and delivered, though not acknowledged, has been intrusted to the mortgagor for the purpose of having it recorded, if he thereupon retains it in his own pos-

session and refuses to deliver it up or have it recorded : *Pierce vs. Lamson*.

Mortgage—Continuance of as Security for new Indebtedness by oral Agreement.—Although a mortgage cannot, by an oral agreement, be continued in force as security for a new indebtedness, not embraced within the terms of its condition, yet, if such an agreement has been made, and money has been advanced in consequence thereof by the mortgagee to the mortgagor, a court of equity will not aid the latter, or one who has taken a conveyance from him with knowledge of the facts, in obtaining a release or discharge of the mortgage from the mortgagee : *Joslyn vs. Wyman*.

Mortgage—Right of Holder of second Mortgage to compel Holder of first to use due diligence, &c.—The holder of a second mortgage of real estate, which is subject to the mortgagor's right of homestead in a part of the premises, may, in a bill to redeem, compel the holder of the first mortgage, which is not subject to the right of homestead, after he has taken and maintained actual and exclusive possession for the purpose of foreclosure, for breach of condition, to account to him for all the rents and profits which by due diligence he might have received, including rent for the homestead : *Richardson vs. Wallis*.

NOTICES OF NEW BOOKS.

REPORTS OF CASES DETERMINED IN THE SUPREME COURT OF THE STATE OF ILLINOIS, during the years 1861 and 1862. By E. PECK, Counsellor at Law. Vol. XXVII. Chicago: E. B. Myers. 1863.

We have here the twenty-seventh volume of the Reports of a State which was almost an unbroken wilderness within the professional life of many members of the bar not yet retired from active service. It seems wonderful, in reading its great number and variety of cases, that so new a state should already present so large a proportion of those important and perplexing problems which occupy the attention of the judicial tribunals in countries of more extended commerce and more advanced social and civil relations. We notice here almost all the questions discussed and determined which we should expect to find in the current volumes of reports in any of the older states. And although in none of them is there much reference to cases out of the state, we cannot perceive but